MALAYSIA STEEL WORKS (KL) SDN BHD

v.

KAMSENG MACHINE WORKS PTE LTD

COURT OF APPEAL, KUALA LUMPUR
ABDUL HAMID MOHAMAD JCA
MOHD NOOR AHMAD JCA
ARIFIN ZAKARIA JCA
[CIVIL APPEAL NO: W-02-450-1997]
30 SEPTEMBER 2003

ARBITRATION: *Arbitrator - Appointment - Power of High Court to appoint - Applicability of s. 12 Arbitration Act 1952 - Delay in arbitration, whether fatal - Limitation Act 1953, ss. 6 & 30 - Objection to appointment of designated arbitrator - Appeal against court's appointment of proposed arbitrator*

This was an appeal by the appellant/respondent ('Malaysia Steel') against the decision of the learned judge appointing one Mr Khoo Eng Chin to arbitrate the contractual disputes that had arisen between Malaysia Steel and the respondent/applicant ('Kamseng'). Kamseng had initially proposed the appointment of Mr GE Kemshall (the arbitrator named in the arbitration clause) but this was met with strenuous objections from Malaysia Steel. Kamseng then proposed Mr Khoo Choong Keow as a substitute whilst Malaysia Steel proposed either Datuk George KS Seah, Mr Khoo Eng Chin or Mr Wilfred Abraham as alternatives. Having considered the proposed arbitrators, the learned judge appointed Mr Khoo Eng Chin but, paradoxically, Malaysia Steel appealed against the said appointment. The issues that arose for decision before the Court of Appeal were: (i) whether s. 12 of the Arbitration Act 1952 ('the Act') was applicable; (ii) whether there was an abandonment of the arbitration contract on the part of Kamseng; and (iii) whether the delay on the part of Kamseng had doused its relief under s. 12 of the Act.

Held (dismissing the appeal):
Per Mohd Noor Ahmad JCA

[1] Although Mr GE Kemshall was the designated arbitrator under the arbitration clause, Malaysia Steel had, subsequent to the disputes, objected to his appointment. As a result of this, there was no

concurrence between the parties in the appointment of an arbitrator. Consequently, s. 12 of the Act was applicable and the court was, accordingly, empowered to appoint an arbitrator upon Kamseng's application. (pp 530 c-h & 531 a)

[2] There was no silence, inactivity or abandonment of the arbitration contract on the part of Kamseng. (p 531 c-e)

[3] The delay on the part of Kamseng was not fatal – considering ss. 6 and 30 of the Limitation Act 1953. As long as Kamseng was still entitled to commence an action founded on contract, it would also be entitled to trigger the mechanism in the arbitration clause. (pp 531 h & 532 a-f)

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan oleh perayu/responden ('Malaysia Steel') terhadap keputusan yang arif hakim kerana melantik seorang En Khoo Eng Chin untuk menimbangtara pertikaian kontraktual yang berbangkit di antara Malaysia Steel dan responden/pemohon ('Kamseng'). Kamseng pada mulanya mencadangkan perlantikan Encik GE Kemshall (penimbangtara yang dinamakan dalam fasal timbangtara) tetapi ianya dibantah keras oleh Malaysia Steel. Kamseng kemudian mencadangkan En Khoo Choong Keow sebagai ganti, manakala Malaysia Steel pula mencadangkan sama ada Datuk George KS Seah, En Khoo Eng Chin atau En Wilfred Abraham. Yang arif hakim, setelah menimbang cadangan-cadangan, melantik En Khoo Eng Chin, tetapi, peliknya, Malaysia Steel pula merayu terhadap perlantikan tersebut. Isu-isu yang berbangkit untuk keputusan Mahkamah Rayuan adalah: (i) sama ada s. 12 Akta Timbangtara 1952 ('Akta') terpakai; (ii) sama ada berlaku peninggalan kontrak timbangtara oleh Kamseng; dan (iii) sama ada kelengahan di pihak Kamseng telah memadamkan relifnya di bawah s. 12 Akta.

Diputuskan (menolak rayuan):
Oleh Mohd Noor Ahmad HMR

[1] Walaupun Encik GE Kemshall adalah penimbangtara yang dinamakan di dalam fasal timbangtara, Malaysia Steel telah, selepas pertikaian, membantah perlantikannya. Kesannya ialah tidak ada persetujuan di antara pihak-pihak dalam perlantikan penimbangtara. Ianya mengikut bahawa s. 12 Akta adalah terpakai dan mahkamah, dengan itu, berkuasa untuk melantik penimbangtara atas permohonan Kamseng.

[2] Tidak berlaku penyepian, pendiaman diri atau peninggalan di pihak Kamseng terhadap kontrak timbangtara.

[3] Kelengahan di pihak Kamseng tidak memudaratkan – mengambilkira ss. 6 dan 30 Akta Had Masa 1953. Selagi Kamseng masih berhak untuk memulakan tindakan berasaskan kontrak, selagi itulah ia berhak untuk menggunapakai mekanisma yang ada dalam fasal timbangtara.

Case(s) referred to:
Emile Erlanger & Ors v. The New Sombrero Phosphate Company & Ors [1878] AC Vol 111 1218 HL ***(refd)***
Fullwood v. Fulwood [1879] 9 Ch D 176 ***(refd)***
Tracomin SA v. Anton C Nielsen A/S [1984] 2 Lloyd's Rep 195 ***(dist)***

Legislation referred to:
Arbitration Act 1952, ss. 12, 24
Limitation Act 1953, ss. 6(1)(a), 30

For the appellant/respondent - RR Sethu; M/s RR Sethu
For the applicant/respondent - GK Ganesan & Ainin Aniyah Mustapha; M/s GK Ganesan

[Appeal from Originating Summons No: R2-24-22-1997]

Reported by Gan Peng Chiang

JUDGMENT

Mohd Noor Ahmad JCA:
By an originating summons, the applicant sought for one Mr. G.E. Kemshall or someone else to be appointed as the arbitrator to settle the disputes between the applicant and the respondent. The learned judge appointed one Mr.Khoo Eng Chin as the arbitrator. Hence, this appeal by the respondent. We dismissed the appeal with costs and ordered the deposit to be paid towards taxed cost. Now, we give our reasons.

Under an agreement of 1 December 1988, the applicant contracted to upgrade the then existing Rolling Mill of the respondent on the site. Subsequently, disputes arose between the parties relating firstly, to an alleged repudiatory breach of the agreement when the respondent refused to allow access to the applicant's servants into the site on 20 May 1991 and secondly, to the discovery by the applicant sometime in May 91 that the machinery and equipment on the site were incomplete, being contrary to the

agreement, and to the fact that the respondent prevented the applicant from making a list of the available equipment on the site. The agreement provides for arbitration of disputes by an arbitrator. One Mr. G.E. Kemshall was named as "the arbitrator we now suggest ...". On 13 June 1991, the applicant through its solicitors wrote to the respondent informing that the former was agreeable to the determination of the agreement, subject to certain terms and conditions to be agreed upon and if the latter did not agree, the matter would be referred to arbitration. On 26 June 1991, the respondent wrote to the applicant's solicitors intimating that its claim might have to go to arbitration in the face of the denial by the applicant of the breach of contract and at the same time requesting for the applicant's proposal for an amicable settlement, on a without prejudice basis. On 13 July 1991, the applicant's solicitors wrote to the respondent submitting the outstanding sums claimed by the applicant from the respondent and intimating that if the respondent did not agree to the claim the applicant would proceed to appoint the arbitrator as designated. The attempt for an amicable settlement failed. On 7 March 1993, the applicant's solicitors wrote to the respondent informing that Mr. G.E. Kemshall had indicated his willingness to arbitrate on the matter. On 22 April 1993, the respondnet's solicitors wrote to the applicant's solicitors intimating that the respondent had no objection to refer the disputes to arbitration, but objected to the appointment of Mr. G.E. Kemshall as the arbitrator, instead requested the applicant to furnish the name of another arbitrator for the respondent's consideration. Nothing came out from this. On 19 February 1997, the applicant's solicitors, by letter, notified the respondent that the applicant wished to refer the disputes to arbitration in the terms of the agreement. However, by letter of 3 March 1997 to the applicant's solicitors, the respondent replied alleging *inter alia*, the abandonment of recourse to arbitration on the part of the applicant. The applicant filed the impugned application on 9 April 1997.

We gather from the notes of proceeding that the application was neither argued before the court nor its merits considered by the learned judge and that the arbitrator appointed by the learned judge was from the list of names proposed by the respondent. Be that as it may, we proceeded to consider the merits of the application based on the submission and reply of both the learned counsel.

Before us, the learned counsel for the respondent raised three issues, *viz*.:

(a) Is s. 12 of the Arbitration Act 1952 (the Act) applicable?

(b) Was there any abandonment of the arbitration contract by the applicant?

(c) Does the delay on the part of the applicant deny the applicant relief under s. 12?

On issue (a), the learned counsel submitted that s. 12 does not apply where there is a specific arbitrator named in the agreement because sub-s. (a) of the section applies only if the parties fail to agree to the appointment of an arbitrator. None of the events contemplated under the section arose in the case since the applicant did not seek the removal of Mr. G.E. Kemshall and for a substitution; and the court cannot uniterally, and its own, remove a named arbitrator without an application for that purpose.

Section 12 of the Act empowers the High Court, in certain cases, to appoint an arbitrator. Under para. (a) of the section, where an arbitration agreement provides that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator, any party may serve the other party with a written notice to appoint or to concur in appointing an arbitrator and if the appointment is not made within twenty-one clear days after the service of the notice, the High Court may, on the application by the party who gave the notice, appoint an arbitrator. And under para. (b) of the section, by the same procedure, the High Court may appoint an arbitrator to replace the arbitrator appointed by the parties if the arbitrator refuses to act, is incapable of acting or dies. Further, s. 24 of the Act empowers the High Court to remove an arbitrator who has misconducted himself or the proceedings. On the facts of this case, in our view, the applicant's application had been properly made to the High Court. Firstly, although under the agreement Mr. G.E. Kemshall was the arbitrator "suggested" by both parties, the respondent objected to his appointment as the arbitrator after the disputes had arisen. Hence, the position thereafter was that there was no agreement between all the parties as to the appointment of an arbitrator. Secondly, the applicant's application is for the appointment of the designated arbitrator or his substitute. It could not be made solely for the replacement of the designated arbitrator because he had already indicated his willingness to arbitrate on the matter. And also, it was still premature to apply for the removal of the designated arbitrator because he had not misconducted himself or the proceedings. And lastly, the applicant had given the required notice to the respondent and no

appointment of an arbitrator had been made by the parties after the lapse of the twenty-one clear days. Therefore, the answer to this issue is in the positive.

With regard to issue (b), the learned counsel submitted that the applicant had abandoned the agreement to arbitrate by its silence and inactivity for some years between the time the disputes first arose (June 91) and the application to the court (9 April 1997). He cited the case of *Tracomin SA v. Anton C Nielsen A/S* [1984] 2 Lloyd's Rep 195 in support thereof. In that case, a delay of 5 1/2 years after the appointment of the arbitrator was held to be an abandonment. He asserted that the ordinary principle applicable to contracts applies to the present case.

With due respect, we find no merits in the submission. From the correspondence between the parties we are satisfied that there was no silence or inactivity at all on the part of the applicant on the contract to arbitrate. In the midst of the proposed amicable settlement, the applicant had been quite loud and active on its intention to arbitrate on the disputes but the arbitration machinery could not get off the ground because of some hurdles placed before it by the respondent. The *Tracomin* case, *supra* can be distinguished. There, the defendant did nothing for 5 1/2 years after the appointment of its arbitrator, the defendant had pursued a parallel action on the same dispute in another jurisdiction and the plaintiff had acted diligently to store the relevant documents for more than ten years which were destroyed by the passage of time; and whereas here, there are no parallel circumstances. Therefore, the answer to this issue must be in the negative.

In respect of issue (c), the learned counsel submitted that s. 12 of the Act confers a discretion on the court or judge. The learned judge ought not to have exercised the discretion to appoint an arbitrator by reason of the delay. Although the applicant explained the delay by reason that it was engaged in other (unrelated) litigation and had placed the matter in the hands of its solicitors, it was wholly insufficient.

In our view, in considering the reason for the delay as advanced by the applicant we must also have regard to two other factors as revealed by the facts. The first factor is the existence of the attempt for an amicable settlement which subsequently failed. The second, is the attitude or conduct of the respondent on the matter relating to the appointment of an arbitrator. Certainly, these two factors had contributed to the delay. Be that as it may, to our mind, the more pertinent question to consider is whether (at the worst

if we are to take that the delay is inordinate and unexplained) such delay is fatal, having regard to the provisions of ss. 6 and 30 of the Limitation Act 1953. Under s. 6(1)(a), the period of limitation for an action founded on a contract is six years from the date on which the cause of action accrued. Similarly, s. 30 confers a six-year limitation for disputes in contracts to be referred to arbitration. On the facts, the applicant's cause of action against the respondent is for the alleged repudiatory breach of the agreement. The cause of action accrued on or about 20 May 1991. The six-year limitation period would creep in only on or after 20 May 1997. The same can be said on the need to refer the disputes arising out of the agreement to arbitration. As the applicant filed the application on 9 April 1997 it was well within time as stipulated in the aforesaid sections for both the action founded on contract and the reference of the disputes in contract to arbitration. As long as the applicant was entitled to commence its action founded on contract, it was also entitled to trigger the mechanism of the arbitration clause as stipulated in the agreement. Mere lapse of time will not be a bar to the granting of relief including an equitable relief, unless it would be a bar to the legal right (re *Fullwood v. Fulwood* [1879] 9 Ch. D 176). And, if the relief is not barred by limitation, the delay is argued against relief being granted based on equitable principles; in which case the court will have to consider the length of the delay and the conduct of the party responsible for the delay whether such conduct may be fairly regarded as equivalent to a waiver or whether such conduct and neglect have prejudiced the other party (re *Emile Erlanger & Ors v. The New Sombrero Phosphate Company & Ors* [1878] AC Vol. 111 1218 HL). However, we are of the view that the facts of this case do not merit our consideration on those factors for the aforesaid reasons. Therefore, the answer to this issue is in the negative.